

OCT 19 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIA CHENG,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-74074

Agency No. A96-049-428

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted October 11, 2005^{**}

Before: HALL, T.G. NELSON and TALLMAN, Circuit Judges.

Jia Cheng, a native and citizen of China, petitions for review of the Board of Immigration Appeals' summary affirmance of an immigration judge's ("IJ") denial of her motion to reopen removal proceedings held in absentia. We have

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 8 U.S.C. § 1252. We review the denial of a motion to reopen for abuse of discretion. *Fajardo v. INS*, 300 F.3d 1018, 1019 (9th Cir. 2002). We grant the petition for review.

The IJ abused his discretion in denying Cheng's motion to reopen, because he failed to consider the factors relevant to whether Cheng established exceptional circumstances, namely whether she failed to appear at her removal hearing due to erroneous advice given to her by the IJ's clerk. *See id.* at 1022 (noting that the IJ's failure to consider the actions of non attorneys as a basis of reopening is clearly erroneous).

Because we are remanding for the agency to determine whether Cheng demonstrated exceptional circumstances, we do not consider her other contentions.

PETITION FOR REVIEW GRANTED; REMANDED.